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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Federal-State Joint Board on Universal Service	CC Docket No. 96-45

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PETITION FOR FORBEARANCE

OPERATOR COMMUNCICATIONS, INC.
d/b/a ONCOR COMMUNICATIONS, INC.

Mitchell F. Brecher
Debra A. McGuire

GREENBERG TRAURIG
1300 Connecticut Avenue, NW
Washington, DC 20036
(202) 331-3100

Its Attorneys

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SUMMARY

Operator Communications, Inc. d/b/a Oncor Communications, Inc. ("OCI") petitions the Commission to forbear from enforcing the practice of using OCI's previous year revenues to determine OCI's calculation of its contribution to the Universal Service Fund ("USF") and to allow OCI to base its USF contributions on current year revenues for 1998 through 2000.

OCI's request meets the statutory standards for granting forbearance set forth in the Telecommunications Act of 1996. First, enforcement of the USF contribution requirements could subject consumers to rates which are not just and reasonable and which are unreasonably discriminatory. OCI, a provider of 0+ calling services from payphones - a declining market segment - has experienced substantially declining revenues in recent years. Thus, its net USF contribution, which is determined by applying a contribution factor to previous year revenues, represents a percentage of current year revenues that significantly exceeds the contribution factor prescribed by the Commission. OCI cannot easily shoulder the cost of USF contributions determined in this matter, which constitutes a growing portion of OCI's current revenues. OCI would have to significantly increase rates to its customers to cover the USF contribution, while carriers with increasing or stable revenues would not require similar increases. Second, forbearance from the USF contribution requirements based on previous year revenues will promote the public interest. The fact that OCI will use a greater percentage of revenues for the USF contribution may force OCI to discontinue service at payphone locations and could lead to reduced availability of payphones to serve the public. Forbearance will ensure that competition in the public telecommunications market will not be impeded and that all individuals will have access to payphone services at affordable rates. Finally, consumers will still receive the same universal service benefits and will not be economically harmed if OCI's petition for forbearance is granted.

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PETITION FOR FORBEARANCE

Operator Communications, Inc. d/b/a Oncor Communications, Inc. ("OCI") Inc., by its attorneys, pursuant to Section 10 of the Communications Act of 1934 ("Communications Act"), as amended,[1] hereby files this Petition for Forbearance requesting the Commission to forbear from enforcing certain of the procedures utilized by the Universal Service Administrative Corporation ("USAC") for calculating OCI's Universal Service Fund ("USF") contribution requirements. In particular, OCI petitions the Commission to forbear from applying or enforcing the USAC practice of using OCI's previous year revenues in determining OCI's contribution to the USF for the years 1998, 1999, and 2000, and to allow OCI to have its USF levels be based on current revenues for those years.[2] OCI also proposes that at the termination of the requested

[1] 47 U.S.C. § 160.

[2] By memorandum opinion and order adopted October 6, 1999, the Commission denied OCI's request for waiver of the USF contribution requirements, specifically the USAC-imposed practice of basing USF contribution levels on previous year revenues. See Federal-State Joint Board on Universal Service, *et al.*, CC Docket No. 96-45, *Memorandum Opinion and Order and Seventeenth Order on Reconsideration*, FCC 99-280 (rel. Oct. 13, 1999) ("*Seventeenth Order on Reconsideration*"). Notwithstanding the Commission's conclusion in that order that OCI had not satisfied the heavy burden required for waiver of the Commission's rules (WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969)), as will be described in this forbearance petition, OCI satisfies each prong of the statutory standard for forbearance from application or enforcement of Commission requirements codified at Section 10 of the Communications Act.

period of forbearance, the Commission assess whether the forbearance period should be continued for an additional period of time.

INTRODUCTION

Pursuant to the Communications Act, as amended by the Telecommunications Act of 1996, the Commission established the USF to ensure affordable telecommunications service to all consumers. The USF is funded by contributions from all providers of interstate telecommunications services and provides funds for several universal service support mechanisms, including programs for schools, libraries, and rural health care providers, as well as for high-cost, rural, and insular areas, and low-income consumers.[3] Section 254 of the Communications Act states that contributions to the USF should be determined on an "equitable and nondiscriminatory" basis.[4] After conducting a rulemaking proceeding, the Commission decided that contributions to the USF would be based on telecommunications carriers' end-user telecommunications revenues multiplied by a factor determined quarterly by the administrator of the USF, the USAC.[5] In the *Second Order on Reconsideration*, the Commission adopted a rule requiring contributors to submit a Universal Service Worksheet ("Worksheet") to the USAC on a semi-annual basis to report revenues.[6] The Worksheet, which was an attachment to the *Second*

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[3] See 47 U.S.C. § 254.

[4] Id. §§ 254(b)(4) & (d).

[5] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776 (1997) (subsequent history omitted) (1997) ("*Universal Service Report and Order*"); Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket No. 97-21, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order and Second Order on Reconsideration*, 12 FCC Rcd 18400 (1997) ("*Universal Service Second Order on Reconsideration*"); see 47 C.F.R. 54.709.

[6] 47 C.F.R. § 54.711(a).

Order on Reconsideration, discloses that the revenues generated in the previous year are used to calculate each telecommunications carrier's prospective USF contribution.[7]

OCI provides operator-assisted (i.e., 0+) calling services from public payphones throughout the United States. In recent years, 0+ carriers at payphones, including OCI, have experienced and continue to experience substantial declines in traffic volumes and revenues.[8] OCI predicts that revenues will continue to decline at an increasing rate over the next few years. As a result, OCI's quarterly USF contribution, as a percentage of current revenues, is significantly greater than the contribution factor. OCI, as well as other telecommunications carriers serving declining market segments, previously requested the Commission to waive the USF contribution requirements to the extent they are based on prior period revenues and to apply the current quarterly contribution factor to current year revenues. The Commission denied all of these requests for waiver.[9] Since the Commission did not waive the USF contribution requirements, OCI now petitions the Commission to forbear from applying the requirements to OCI for the years 1998 through 2000 and to allow OCI to calculate its USF contribution based on current year revenues for those years. If the Commission grants the petition, OCI proposes that its 1998 and 1999 USF contributions be based on actual revenues for those years and that its

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[7] *Second Order on Reconsideration*, 12 FCC Rcd 18400, ¶¶ 43, 80 & Appendix C. The Worksheet explains that revenue data from January 1 through July 1 will be filed on September 1 of the same year and that such data will be used to calculate the USF contribution for January through June of the following year. Similarly, a portion of revenue data filed March 31 for the entire prior calendar year, i.e., the revenue data representing the period from July 1 through December 31, will be used to calculate the USF contribution for July through December of the following year.

[8] These declines primarily result from three causes: (1) a dramatic increase in "dial around" calling through the use of 1-800 and other access codes; (2) the growth of the prepaid calling card industry segment; and (3) wide usage of cellular, PCS, and other wireless services in lieu of wireline payphone calling.

[9] *Seventeenth Order on Reconsideration*, ¶¶ 28-31, 34.

2000 USF contributions be based on estimated revenues for 2000, subject to a true-up to ensure that OCI does not under-report revenues to minimize its USF contribution. Furthermore, OCI requests that the Commission evaluate at the conclusion of the initial period whether the forbearance period should be continued.

ARGUMENT

The Commission has allowed the USAC to calculate each telecommunications carrier's USF contribution by applying a contribution factor to revenues generated in the previous year.[10] However, Section 10 of the Communications Act, codified at 47 U.S.C. § 160, directs the Commission to forbear from applying any regulation or any provision of the Communications Act to a telecommunications carrier or telecommunications service, or classes of such carriers or services, if the Commission determines that three conditions are present: (1) enforcement of such regulation is not necessary to ensure that "charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier . . . are just and reasonable and are not unjustly or unreasonably discriminatory;" (2) enforcement of such regulation is not necessary for the protection of consumers; and (3) forbearance from applying such regulation is consistent with the public interest.[11] Section 10 further provides that forbearance is in the public interest if the Commission determines that forbearance of a regulation promotes competition among providers of telecommunications services.[12] OCI's request that the Commission forbear from requiring OCI to utilize previous year revenues to determine its USF contribution meets the three conditions in Section 10 and thus, the Commission should grant OCI's Petition for Forbearance.

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[10] See supra p. 2 & n.5.

[11] 47 U.S.C. § 160 (a)(1) - (3).

[12] 47 U.S.C. § 160 (b).

I. Absent Forbearance, The USAC USF Contribution Requirements Will Cause Customers Of Telecommunications Carriers Serving Declining Market Segments To Pay Rates Which May Not Be Just And Reasonable, Or Which May Be Unreasonably Discriminatory.

Enforcement of the USF contribution requirements established by the Commission in the USAC Worksheet is not necessary to ensure that the charges, practices, or classifications of telecommunications carriers are just and reasonable and not unjustly or unreasonably discriminatory. In fact, application to OCI of the requirement that USF contributions be based on carriers' revenues from the previous year could result in customers of OCI being charged rates which are not just and reasonable or which are unreasonably discriminatory.

Under the current method of using prior year revenues to calculate USF contributions, a telecommunications carrier like OCI which serves a declining market segment is required to pay a disproportionately greater percentage of its current revenues as a USF contribution in comparison with carriers serving growing market segments whose revenues are stable or increasing. In other words, in the case of a carrier with declining revenues, the net amount of a carrier's USF contribution represents a percentage of the carrier's current revenue that is larger than the USF contribution factor prescribed by the Commission, while the USF contribution paid by a telecommunications carrier with increasing revenues represents a percentage of current revenues that is lower than the contribution factor. Thus, carriers serving declining market segments must, absent forbearance, use a greater percentage of their current revenues for USF contributions.

Due to the existence of such declining revenues, together with the fact that a greater portion of revenues is used for USF contributions, a carrier such as OCI is not able to absorb the costs of USF contributions as easily as a carrier with stable or increasing revenues. In 1998, OCI's monthly USF contribution was approximately $127,000. That amount represented 3.7

percent of OCI's pro rata monthly revenues from the first half of 1997, but represented 6.85 percent of OCI's pro rata monthly revenues in 1998 – an 85 percent increase in the percentage of OCI's revenues allocated to payment of its USF contribution. In contrast, in 1998, carriers with increasing or stable revenues only contributed 3.7 percent of their revenues or less to pay their USF contributions. This disparity places OCI at a severe financial and competitive disadvantage when setting rate levels sufficient to recover its costs, including the cost of providing statutorily-mandated universal service support. If OCI passes through the cost of its USF contributions to its customers, such an adjustment would be relatively greater than an adjustment to charges by a carrier with stable or increasing revenues. As a result, mechanistic application of the current USF contribution requirements based on previous year revenue levels without regard to a carrier's shrinking revenues as its market segment erodes could result in customers of those declining carriers being subject to rates which are considerably higher than the rates for comparable services charged by those carriers whose USF contribution levels relative to their <u>current</u> revenues are substantially lower. Therefore, forbearance from application or enforcement of the USF contribution requirements with regard to telecommunications carriers serving declining market segments, such as OCI, promotes the statutory criterion codified at 10(a)(1) of the Communications Act of ensuring just and reasonable and not unreasonably discriminatory rates.

II. Consumers Will Not Be Harmed If OCI's USF Contributions Are Based On Current Year Revenues Rather Than Prior Year Revenues.

Application to OCI of the USAC-imposed prior year revenue requirement for establishing USF contribution levels is not necessary to protect consumers and indeed will disserve the interests of consumers. A primary purpose of universal service is to ensure quality services to consumers in all regions of the United States at "just, reasonable, and affordable rates."[13] OCI's request that the Commission forbear from applying the USF contribution requirements to OCI based on OCI's previous year revenues will not interfere with the amount of funding available for universal service programs, and therefore, does not take any benefits of the universal service programs away from consumers.

The Commission's rules state that contributions to the USF shall be based on end-user telecommunications revenues. However, nothing in those rules or in Section 254 of the Act requires or even suggests that previous year revenues be used in calculating USF contribution levels. To determine the contribution factor to be applied to telecommunications carriers' revenues, the USAC projects universal service program costs and expenses for the upcoming quarter that the Commission approves.[14] The Commission's rules provide that the USAC can request authority from the Commission to borrow funds commercially, if the contributions received by the USAC in a quarter are insufficient to cover the universal service support payments and administrative costs.[15] Consumers are guaranteed that they will receive all the benefits of the universal service programs. Whether contributions to the USF are based on previous or current year revenues has no impact on consumers. In addition, as noted in the preceding section, application of the USAC-imposed method of calculating USF funding contribution levels based on previous year revenues will harm consumers of OCI services by placing OCI in the position of having to increase rates in order to recover the costs of its USF contributions from its declining customer base. Therefore, application to OCI the USAC's

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[13] 47 U.S.C. § 254(b).

[14] 47 C.F.R. § 54.709 (a).

[15] 47 C.F.R. § 54.709 (c).

decision to use prior year revenues on the Worksheet is not necessary to protect consumers and, in fact, will cause economic harm to consumers.

III. Forbearance From Applying The USF Contribution Requirements Will Promote Competition Among Providers Of Telecommunications Services And Will Serve The Public Interest.

Forbearance from application or enforcement of the USF contribution requirements, including the requirement that contributions be based on prior year revenues, to OCI as described above, will promote competition in the public telecommunications market segment. In addition, it will prevent harm to the public interest resulting from the decreased availability of public payphones. 0+ carriers serving payphones, such as OCI, are experiencing substantial declines in traffic volumes and revenues. These declines are the result of marketplace changes as well as changing rules and policies. For example, implementation of the requirements of the Telephone Operator Consumer Services Improvement Act of 1990 (codified at Section 226 of the Communications Act) and the Commission's rules implementing that act have led to a dramatic increase in the use of so-called "dial-around" services to initiate calls from public telephones. In addition, the wide availability of wireless services – cellular and PCS – following implementation of Commission rules and policies to make such services available and to encourage their growth has increased public usage of those services in lieu of 0+ calling from payphones. Under the current USF contribution system, carriers serving the diminishing 0+ payphone market segment, such as OCI, must allocate a greater percentage of their current revenues to USF contributions, than such carriers would allocate if contributions were based on current revenues. As a result, OCI has incurred, and will continue to incur, a reduction in net revenues and a potential loss of profitability. The assessment of USF contributions based on previous year revenues will cause OCI, along with other 0+ carriers serving the declining payphone service market, to terminate their services to payphones, thus decreasing availability of

0+ services at public locations, as well as the availability of payphones themselves. A reduction in the number of carriers providing services to payphones harms competition in the public payphone market, and, perhaps more importantly, would limit the availability of service at many locations where payphones currently are located.

Moreover, 0+ carriers will likely cease providing service to payphones that are least profitable. Such payphones are primarily located in rural areas, or in urban areas with low-income consumers. Therefore, the current USF contribution system as implemented by USAC harms the public interest by impeding the statutory objective of universal service, which is based on the principle that all consumers, "including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and informational services . . . that are reasonably comparable to those provided in urban areas."[16] Granting OCI's Petition for Forbearance will promote the public interest by advancing universal service programs while maintaining a competitive market for 0+ payphone services, thereby ensuring that adequate public telecommunications services and facilities remain available to the public.

Finally, forbearance from enforcing the USF contribution requirements achieves the Commission's goal of establishing competitively neutral USF contributions. The Commission "conclude[d] that competitively neutral rules will ensure that . . . disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers."[17] OCI, like other 0+ carriers serving payphones, is experiencing declining

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[16] 47 U.S.C. § 254; <u>see also</u> *Universal Service Report and Order*, 12 FCC Rcd 8776, ¶ 1.

[17] *Universal Service Report and Order*, 12 FCC Rcd 8776, ¶ 48; <u>see also</u> <u>Federal-State Joint Board on Universal Service</u>, *Notice of Proposed Rulemaking and Order Establishing Joint Board*, 11 FCC Rcd 18092, ¶¶ 125-26 (1996).

revenues due to changes in the telecommunications industry. Dial-around calling and prepaid calling cards offer consumers alternatives to using a presubscribed 0+ carrier at a payphone. In many cases, wireless telephones eliminate a consumer's need for a payphone. However, some customers of payphones still rely on 0+ carriers as their only option for placing long-distance calls from payphones.

The current USF contribution requirements place those providers which serve primarily customers from public telephones by providing 0+ service from those phones, as well as their customers, at a disadvantage. Carriers like OCI whose service is limited to declining market segments are competitively disadvantaged in comparison with carriers serving market segments characterized by increasing or stable revenues, because such carriers must use a greater portion of their revenues to pay their USF contributions. As a result, carriers serving declining market segments will have difficulty absorbing the cost of USF contributions and will either increase charges or cease to provide service to payphones. Either option harms consumers by unnecessarily raising the costs of 0+ service at payphones and by limiting the availability of such service from payphone locations, as well as by limiting the number of available payphone locations. Forbearance as requested in this petition will alleviate the competitive disadvantage to carriers serving declining market segments and who are experiencing shrinking revenues, such as OCI, and will prevent harm to consumers by allowing OCI to allocate a competitively neutral portion of its revenues to the payment of its USF contribution. Pursuant to the forbearance request contained herein, the Commission will have another opportunity to revisit the need for continued forbearance beyond the year 2000 based on information regarding the market segment and the petitioning carrier at that time.

CONCLUSION

OCI respectfully requests the Commission to grant this Petition for Forbearance and allow OCI to calculate its USF contribution for the years 1998, 1999, and 2000 based on current revenues for those years. OCI further requests that at the end of the initial period of forbearance the Commission evaluate whether the forbearance period should be extended.

Respectfully submitted,

OPERATOR COMMUNCICATIONS, INC.
d/b/a ONCOR COMMUNICATIONS, INC.

Mitchell F. Brecher
Debra A. McGuire

GREENBERG TRAURIG
1300 Connecticut Avenue, NW
Washington, DC 20036
(202) 331-3100

Its Attorneys

November 17, 1999

<u>CERTIFICATE OF SERVICE</u>

I, Melodie Kate, a secretary in the law firm of Greenberg Traurig, certify that on the 17th day of November, 1999, I have caused to be served by hand delivery, a true copy of the foregoing PETITION FOR FORBEARANCE to the following:

Lawrence E. Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, S.W., Room 5-B303
Washington, D.C. 20554

Jane E. Jackson
Chief, Competitive Pricing Division
Federal Communications Commission
The Portals
445 Twelfth Street, S.W., 5-A207
Washington, D.C. 20554

International Transcription Service, Inc.
The Portals
Room CY-B400
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jeffrey Dygert
Enforcement Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, S.W., Room 5-C217
Washington, D.C. 20554

Melodie Kate

Melodie Kate

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